

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL E. CRITTENDON,

Defendant-Appellant.

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UNPUBLISHED

July 15, 2003

No. 239333

Wayne Circuit Court

LC No. 01-005301-01

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of eight to eighteen years for the murder conviction and to a mandatory two-year concurrent prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied a fair trial as the result of four instances of prosecutorial misconduct. Defendant failed to object to any of the allegedly improper remarks. Where a defendant has failed to timely and specifically object, this Court will only review the defendant's claim of prosecutorial misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must prove that (1) error occurred; (2) the error was plain, meaning clear or obvious; and (3) the plain error affected the defendant's substantial rights. The third requirement generally requires prejudice, i.e., that the error affected the outcome of the trial. *Schutte, supra* at 720. Prosecutorial misconduct is determined on a case-by-case basis and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant first argues that he was unfairly prejudiced when the prosecutor made the following remark during rebuttal closing argument:

The presumption of innocence doesn't mean that the defendant is innocent. It's just sort of like a rule that you play ball with. It's like you don't call the pitch whether it's a ball or strike until it's over the plate. Presumption of innocence just means that until you go into the jury room and you discuss the evidence. And at

the point that you decide that the evidence proves him beyond a reasonable doubt, the presumption of innocence disappears. It's nothing magical about it.

There was nothing improper about the prosecutor's comment that the presumption of innocence would disappear once the jury decided that the evidence proved defendant's guilt beyond a reasonable doubt. The presumption of innocence "stands good until overcome by evidence which convinces the jury beyond a reasonable doubt that [the defendant] is guilty." *People v McClintic*, 193 Mich 589, 603; 160 NW 461 (1916). To the extent the prosecutor's remarks implied that the presumption disappears when the jurors enter the jury room, it was clarified by the prosecutor's next statement and any error was cured by the trial court's proper instructions to the jury regarding the presumption of innocence. *People v Solak*, 146 Mich App 659, 677; 382 NW2d 495 (1985).

Defendant also argues that the prosecutor improperly urged the jury to convict defendant based on the people with whom defendant associated.

During trial, defendant admitted that he had knowingly sold clothing to drug dealers, and in regard to defendant trying to distance himself from people who may have had a "bad influence" on him, defendant stated that he was "different from the rest of them. [He] wasn't involved in drugs and stuff," and he was selling clothes to the dealers in order to help pay for his college education. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, in reviewing the prosecutor's remarks in context, he was merely responding to, or rebutting, defendant's efforts to portray himself as a good college student who was simply "caught in the wrong place at the wrong time." Accordingly, there was no plain error requiring reversal.

Defendant next argues that the prosecutor improperly suggested that defendant's failure to go to the police was indicative of his guilt.

A defendant's pre-arrest silence may be used to impeach the defendant, but may not be used as substantive evidence of the defendant's guilt. *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 LE 2d 106 (1965). Here, after the prosecutor commented on defendant's pre-arrest choice to remain silent, he specifically explained to the jury that defendant's silence was evidence that he was not an honest person. The prosecutor stated, "And now –what does that tell you? That he is deceitful. That he is not honest." Defendant was properly impeached by the prosecution regarding his failure prior to his arrest to tell the police a version of the incident consistent with his self-defense theory. *People v Patterson*, 170 Mich App 162, 172; 427 NW2d 601 (1988).

Defendant next argues that the prosecutor improperly vouched for the state's witnesses by supplementing their testimony with that of witnesses who did not appear at trial. In his closing argument, the prosecutor stated:

Even when the defense attorney told you what James White said to Debra Foster it was the same.

Mike [defendant] grabbed the gun off the table and shot T.J. [decedent] and then pointed the gun at Greg, Fat Babe and told him to shut up and sit down. The same thing from James White who wasn't there who heard it from others, who tells you that Greg, White, and Nelson Williams were all saying the same thing about what happened. Being consistent because that's what occurred.

Defendant argues that the above statements by the prosecutor constituted improper vouching and require reversal because the prosecutor asserted that White, who did not testify at trial, would have corroborated the prosecution witnesses' testimony.

The prosecutor may argue the evidence and his theory of the case derived from that evidence, but may not allude to evidence that is inadmissible or does not exist. *People v Riemersma*, 104 Mich App 773, 783; 306 NW2d 340 (1981). Here, the prosecutor improperly referred to what James White would have testified to because James White did not testify at trial. However, even where the prosecutor's comments constitute plain error, reversal is not warranted if the error did not affect defendant's right to a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Improper prosecutorial comments do not affect the defendant's right to a fair trial where they could have been, and were, cured by the trial court's proper jury instructions. *Solak, supra* at 676. Here, the trial court properly instructed the jury that it must decide the facts of the case, that it could only consider the evidence admitted at trial, and that the attorneys' arguments did not constitute evidence. The trial court also properly instructed the jury on the presumption of innocence, and the prosecution's burden of proof. Further, the prosecutor's statement informed the jury that James White "wasn't there" and that "he heard it from others." Thus, it was made clear to the jury that White was not a witness and gathered his information from witnesses whose testimony was presented at trial. Under these circumstances, we find that plain error requiring reversal is not present in this case.

Next, defendant asserts that he was denied the effective assistance of counsel when his attorney requested jury instructions on voluntary manslaughter instead of instructions on imperfect self-defense and when he failed to object to the alleged improper prosecutorial comments discussed above.

Determination of effective assistance of counsel is a mixed question of law and fact. Factual findings are reviewed for clear error and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3), that the resultant proceedings were fundamentally unfair or unreliable. *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant must overcome a strong presumption that counsel's action was sound strategy to satisfy his burden. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

The elements of voluntary manslaughter are: (1) the defendant killed in the heat of passion; (2) adequate provocation caused the passion; and (3) no lapse of time existed between the provocation and the killing during which a reasonable person could control the passion. *People v Pouncy*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation necessary must be that which would cause a reasonable person to lose control. *Id.*, 510. Imperfect self-defense may mitigate a murder charge down to a to a manslaughter charge if the defendant was the aggressor or the initiator of the conflict, but did not intend to kill, inflict great bodily harm, or use excessive force. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). The defense is applicable where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. *Id.*

The theory of imperfect self-defense is not applicable in the present case. The prosecution's witnesses testified that defendant was the initial aggressor but that he did not act in self-defense. Defendant testified that the decedent was the initial aggressor. Thus, under the theories of both the prosecution and the defense, the elements for imperfect self-defense were not met. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defense counsel sought a jury instruction on voluntary manslaughter, and defendant's testimony at trial supported such a theory. A jury could have found that the decedent's acts of waving of the gun around and making threats constituted adequate provocation to mitigate the offense down to voluntary manslaughter. Therefore, defense counsel's decision to request a voluntary manslaughter jury instruction was likely a strategic decision that this Court will not second-guess on appeal. *Rice, supra* at 445.

Finally, defendant argues that he was denied a fair trial by defense counsel's failure to object to the alleged prosecutorial misconduct previously discussed. However, we have already concluded that the various remarks made by the prosecutor, if improper, did not affect defendant's ability to receive a fair trial. Therefore, defendant was not prejudiced by counsels' failure to object.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Helene N. White